BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLOTTE WALL	)	
Claimant	)	
VS.	)	
	)	Docket No. 250,085
GAGE BOWL, INC.	)	
Respondent	)	
	)	
AND	)	
	)	
KANSAS RESTAURANT AND HOSPITALITY ASSOCIATION SELF-INSURANCE FUND	)	
Insurance Carrier		

ORDER

Respondent and its insurance carrier appealed from an Award dated January 15, 2002 entered by Administrative Law Judge Brad E. Avery. The Appeals Board head oral argument on July 16, 2002.

Appearances

Bruce A. Roby of Topeka, Kansas, appeared on behalf of claimant. Jeffery R. Brewer of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

Record and Stipulations

The Appeals Board (Board) has considered the record and adopted the stipulations listed in the Award. In addition, the Board considered the transcripts of the May 9, 2000 Preliminary Hearing, the October 10, 2000 Preliminary Hearing and the July 18, 2001 deposition of Dick Santer.

Issues

The sole issue on appeal is the nature and extent of claimant's disability. The Administrative Law Judge (ALJ) found claimant's right upper extremity injury was a direct and natural consequence of her left upper extremity injury and therefore the two should be compensated on the basis of an injury to the body as a whole. Respondent contends the ALJ erred in awarding claimant a permanent partial general body disability because claimant did not suffer any permanent impairment to her upper extremities, but even if she did, the upper extremity injuries were not simultaneous and therefore do not combine to make a whole body impairment. Instead, claimant should be compensated on the basis of two separate scheduled injuries.

Claimant argued that the ALJ's Award should be affirmed.

Findings of Fact and Conclusions of Law

After reviewing the entire record and having considered the arguments and briefs of the parties, the Board finds that the Award entered by the ALJ should be affirmed. The Board adopts the findings, conclusions and orders of the ALJ as its own as if specifically set forth herein.

Claimant worked for respondent approximately eight years. At the time she was injured claimant was the manager of the snack bar. Her duties included running the grill and serving customers. On September 16, 1998, as she was pouring a pan of gravy she experienced a sharp, excruciating pain in her left elbow. This accident and the resulting medical treatment claimant received brought to light several repetitive use injuries that had been developing over a period of time. Consequently, although a single accident date is alleged, claimant actually suffered a series of accidents and traumas, followed by overcompensation and additional overuse injuries. In its brief to the Board, respondent describes the onset of claimant's symptoms this way:

> The testimony is clear in this case and is uncontroverted. Claimant sustained a specific left elbow/arm injury, which occurred while lifting a saucepan of gravy in the work place on September 16, 1998. Claimant's left arm was then put in a sling, and upon returning to work, she assumed work activities utilizing her right upper extremity. Approximately 2 weeks after returning to work and utilizing her right upper extremity, claimant first developed symptomatology and pain in her right upper extremity caused by her work activities. Claimant by her own admission attributes the onset of her pain and symptomatology in her right upper extremity to the work

activities again which started approximately 2 weeks after the initial traumatic left elbow injury.[1]

Claimant first sought medical treatment at the Stormont-Vail hospital emergency room. She was told she had tendinitis and given a prescription for an anti-inflammatory medication. Her arm was put in a sling and she was released. She was also given a referral to Dr. Mary Franz who placed claimant in physical therapy. Claimant returned to work until January 27, 1999 when claimant had surgery. During that period of about four months, she continued to have problems with her left elbow and also developed symptoms in her right elbow. When claimant returned to work following her surgery she performed mostly lighter job tasks. But she performed that light duty work by primarily using only her right arm. Claimant said she was straining her right elbow doing this work with her right arm. The last day claimant worked for respondent was October 4, 1999.

Dr. Franz referred claimant to Dr. Knappenberger. After Dr. Knappenberger did the surgery, Dr. Delgado became her treating physician and released claimant. During this period claimant was also seen by Drs. McKinney, Estivo and Gardner.

Claimant first saw Dr. Delgado on June 4, 1999. He treated claimant through September 7, 1999. After that date Dr. Delgado stopped treating claimant without giving her any explanation except to tell her she needed to contact a representative of the insurance carrier. At that time claimant was on light duty restrictions and Dr. Delgado had prescribed Darvocet for pain and Amitriptyline to help her rest. On August 15, 2001, Dr. Delgado saw claimant again at the request of respondent for an independent medical examination. Dr. Delgado opined that claimant had no impairment, no restrictions and no task loss. In his opinion, claimant had reached maximum medical improvement from any work-related injury on September 7, 1999. He believes that he did communicate that to claimant.

On August 20, 2001, claimant met with Dr. Chris Fevurly for an evaluation at respondent's request. Although Dr. Fevurly diagnosed carpal tunnel syndrome on the left and lateral epicondylitis, he also said it was unlikely that work was the cause of claimant's ongoing complaints. Accordingly, he also gave claimant no permanent impairment and no restrictions for the September 16, 1998 accident. He believed claimant was capable of returning to her former job with respondent.

The ALJ appointed board certified plastic surgeon Lynn D. Ketchum, M.D., to perform an independent medical examination of claimant. Using the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment, Dr. Ketchum rated claimant at

---

[1] Brief of Respondent and Insurance Carrier for Board Review, p. 5 (filed Feb. 20, 2002).

10 percent to the right upper extremity and 15 percent to the left upper extremity, which he combined to a 15 percent impairment of function to the body as a whole. He diagnosed claimant with medial and lateral humoral epicondylitis, intersection syndrome and a tear of the flexor pronator upon neurosis on the left which he attributed to the gravy pouring incident. He further noted her status as post carpal tunnel release surgery. As to the right upper extremity, Dr. Ketchum diagnosed edema as a result of overuse and overcompensation for the left upper extremity injuries. He recommended restrictions of no repetitive left elbow bending, no repetitive use of the right upper extremity and no lifting over two pounds with both hands. Dr. Ketchum reviewed a list of work tasks claimant had performed during the 15 years before her injury. It was Dr. Ketchum's opinion that claimant had lost the ability to perform 9 out of the 11 tasks listed, for an 82 percent task loss.

Claimant bears the burden of proof to establish her right to an award of compensation to prove "the various conditions on which the claimant's right depends."[2] The Board must consider the entire record to determine whether claimant has satisfied her burden of proof. The Workers Compensation Act defines the term "burden of proof" as the "the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true."[3]

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA Guides. At the time of claimant's injury, the Act required that functional impairment be based on the Fourth Edition of those Guides.[4]

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.[5]

The Board finds claimant has a 10 percent impairment of function to the right upper extremity and a 15 percent impairment of function to the left upper extremity. These convert to a 15 percent impairment of function to the body as a whole. In addition, claimant has lost the ability to perform 82 percent of the work tasks she had performed during the 15 years next preceding her work-related injury. These conclusions are based

---

[2] K.S.A. 1998 Supp. 44-501(a).

[3] K.S.A. 1998 Supp. 44-508(g); Chandler v. Central Oil Corp., 253 Kan. 50, 57, 853 P.2d 649 (1993).

[4] K.S.A. 1998 Supp. 44-510e(a).

[5] Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

upon the ratings and opinions of Dr. Ketchum whom the Board finds to be the most credible and persuasive medical expert in this case.

The Workers Compensation Act recognizes two classes of injuries other than those which result in death or total disability, and those are permanent disability to a scheduled part of the body and permanent partial general disability.[6] Scheduled injuries are individually defined and described in K.S.A. 1998 Supp. 44-510d. The loss of use of an arm is a scheduled injury.[7]

"When a specific injury and disability is a scheduled injury under the Workmen's Compensation Act, the benefits provided under the schedule are exclusive of any other compensation."[8] K.S.A. 44-510c(a)(2) has been extended by case law to allow compensation for certain combination injuries based on permanent partial disability.[9]

In Murphy v. IBP, Inc., the Supreme Court held that simultaneous aggravation to both arms and hands through repetitive use removes the disability from a scheduled injury and converts it to a general disability. "Where a claimant's hands and arms are simultaneously aggravated, resulting in work related injuries to both hands and arms, the injury is compensable as a percentage of disability to the body as a whole under K.S.A. 44-510e."[10]

In Honn v. Elliott, the Supreme Court noted that the schedule of injuries found at R.S. Supp. 1930, 44-510(3)(c)(1) to (20) failed "to provide compensation for both members when they are in pairs."[11] The Court then analogized to the permanent total statute and concluded that "when two feet are injured, as in the case before us, the compensation should not be computed for each one separately, as for the injury to one foot as provided by the schedule, but should be computed [as a body as a whole injury]."[12] K.S.A. 44-

---

[6] *See* K.S.A. 1998 Supp. 44-510d; K.S.A. 1998 Supp. 44-510e.

[7] K.S.A. 1998 Supp.44- 510d(a)(13). *See also* K.A.R. 51-7-8(c)(4).

[8] Berger v. Hahner, Foreman & Cale, Inc., 211 Kan. 541, 545, 506 P.2d 1175 (1973).

[9] *See* Hardman v. City of Iola, 219 Kan. 840, 844, 549 P.2d 1013 (1976); Downes v. IBP, Inc., 10 Kan. App. 2d 39, 691 P.2d 42 (1984), *rev. denied* 236 Kan. 875 (1985).

[10] Murphy v. IBP, Inc., 240 Kan. 141, 144, 727 P.2d 468 (1986); *See also* Depew v. NCR Engineering & Manufacturing, 263 Kan. 15, Syl. ¶ 1, 947 P.2d 1 (1997).

[11] Honn v. Elliott, 132 Kan. 454, 295 Pac. 719 (1931).

[12] Honn, at 458.

510c(a)(2) has been amended since Honn and now provides, in relevant part, "[l]oss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability."

Finally, in Pruter v. Larned State Hospital, the Kansas Supreme Court reaffirmed the applicability of the Honn rule to the loss of use of parallel limbs that caused substantial impairments.[13] While Pruter dealt with simultaneous injuries, the Board believes the rule is likewise applicable where repetitive trauma injuries are treated as a single accident and, as in this case, where a second injury is found to be direct consequence of the first and is likewise treated as a single accident.[14] A scheduled injury may evolve into a general disability through the subsequent occurrence of direct and natural consequences. [15]

The Appeals Board finds the Supreme Court's analysis in Pruter, coupled with the language of K.S.A. 44-510c(a)(2), requires an award based upon a general body disability and not two separate scheduled injuries under K.S.A. 1998 Supp. 44-510d. Accordingly, claimant is entitled to a permanent partial general disability award based upon her 15 percent functional impairment to the body as a whole during the period she was working and earning at least 90 percent of her average weekly wage, followed by a 74.5 percent work disability beginning October 8, 1999, when she was forced to leave work due to her injuries.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Brad E. Avery dated January 15, 2002, should be, and is hereby, affirmed.

IT IS SO ORDERED.

---

[13] Pruter v. Larned State Hospital, 271 Kan. 865, 26 P.3d 666 (2001).

[14] *See* Frazier v. Mid-West Painting, Inc., 268 Kan. 353, 995 P.2d 855 (2000); Gillig v. City Service Gas Co., 222 Kan. 369, 564 P.2d 548 (1977); Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972). *See also* Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1082 (1996).

[15] Berger v. Hahner, Foreman & Cale, Inc., 211 Kan. 541, 549, 506 P.2d 1175 (1973).

Dated this _____ day of July 2002.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Jeffrey R. Brewer, Attorney for Respondent and Insurance Carrier
Bruce A. Roby, Attorney for Claimant
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director